which can be imputed to the insurance company. In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

In the instant case the defendant in the proposal form declared that the particulars given by him were true and that he agreed that "the proposal shall be the basis of the contract" between him and the National Insurance Co. Ltd.

On the top left hand corner of this proposal form was a warning prominently printed in red in the following words: —

"Statement pursuant to section 16(4) of the Insurance Act 1963.

'You are to disclose in this proposal form fully and faithfully, all the facts which you know or ought to know, otherwise the policy issued hereunder may be void'."

Section 16(4) of the Insurance Act 1963 reads: — "No Malaysian insurer shall use in Malaysia a form of proposal which does not have prominently displayed therein a warning that if a proposer does not fully and faithfully give the facts as he knows them or ought to know them, he may receive nothing from the policy."

Since the defendant has declared in his proposal form that the particulars given are true, it is his duty to see and to ensure that his answers are correctly inserted before he signs it. By signing it he would be taken to have read and adopted them.

On the evidence before me I found as a fact that the defendant did not disclose to the plaintiffs or their agent that his policy of insurance with the New India Assurance Co. Ltd. had been cancelled, nor did he disclose to them that he has had a motor accident. On the evidence I came to the irresistable conclusion that he had deliberately suppressed and misrepresented these material facts.

I am of the opinion that a contract of insurance is a contract of utmost good faith. Any suppression or non-disclosure of material facts by the proposer will entitle the insurance company to avoid the contract. A fact is material if it would influence the judgment of a prudent or reasonable insurer in fixing the premium or in determining whether he will or will not take the risk. Lord Mansfield as long ago as 1766 said in *Carter* v. *Boehm*[9] that: —

"Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement....

The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary."

In *Rozanes* v. *Bowen*[10] Lord Justice Scrutton said: —

"It has been for centuries in England the law in connection with insurance of all sorts, marine, fire, life, guarantee and every kind of policy, that, as the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriter knows nothing and the assured knows everything. This is expressed by saying that it is a contract of the utmost good faith — *uberrima fides.*"

In *Brownlie* v. *Campbell*[11] Lord Blackburn said: —

"In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrima fides*, that if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy...."

Under the circumstances of this case I therefore hold that plaintiffs are entitled to an order declaring the policy of insurance granted by them to the defendant void. Plaintiffs shall have the costs of the suit to be taxed by the proper officer of the court.

Application granted.

Solicitors: *R. K. Nathan & Co.; David Ng Kim Seng & Co.*

SENG GUAN CO. v. LIM CHOON KEOK & ORS.

[A.C.J. (Gill F.J.) October 14, 1973]
[Muar — Civil Appeal No. 2 of 1973]

Workmen's Compensation — Whether accident arose out of and in the course of employment — Workman drowned after collecting tools from sampan in river to go back to factory to repair machine which was out of order — Workmen's Compensation Ordinance, 1952, ss. 27 and 39(2).

This was an appeal from the decision of the President, Sessions Court, Muar, sitting as arbitrator under the Workmen's Compensation Ordinance. The facts were that the deceased was a foreman and chief engine driver employed by the appellants in their factory. On the day in question after he finished his shift duty and had gone home he was recalled to the factory to repair a machine which was out of order. On his way to the factory, the deceased went to a sampan in the Muar river to collect his basket of tools and while coming out of the sampan he fell into the river and was drowned. The respondents, the wife and children of the deceased, applied for workmen's compensation. The arbitrator held that the accident arose out of and in the course of the deceased's employment and he awarded to the defendants a sum of $7,200 as compensation. The appellants appealed.

Held: the learned arbitrator had rightly decided that the deceased died of an accident arising out of and in the course of his employment and the appeal must be dismissed.

Cases referred to:-

(1) *Kuppusamy* v. *Golden Hope Rubber Estate Ltd.* [1965] 1 M.L.J. 178.

(2) *Blee* v. *London and North Eastern Railway Company* [1937] 4 All E.R. 270.

(3) *Harris* v. *Associated Portland Cement Manufacturers Ltd.* [1938] 4 All E.R. 831, 832.

(4) *Thomas* v. *Pentremawar Colliery Company Ltd.* (1927) 136 L.T. 208.

CIVIL APPEAL.

S. G. Thakurta for the appellants.

Tan Tian Tiok for the respondents.

Gill F.J.: This is an appeal on a certificate under section 39(2) of the Workmen's Compensation Ordinance, 1952 from a decision of the President, Sessions Court, Muar, sitting as an arbitrator under section 30 of the Ordinance.

The facts of the case are not in dispute. One Lim Yam Leng was employed as a foreman and chief engine driver by the appellants in their factory at 1½ milestone Jalan Jorak, Bukit Pasir, Muar. On September 17, 1969 he was on night shift from 5 p.m. Having finished his shift duty at 9 a.m. on September 18, 1969 he left the factory to go home. As soon as he reached home at about 9.30 a.m. his wife told him that the owner of the factory had called at the house a few minutes earlier and left a message for him to go back to the factory as the machine was out of order. On hearing this he left immediately for the factory, telling his wife that he would have to collect his tools on the way and rush to the factory but without saying from where the tools were to be collected. He then went to collect his basket of tools from a sampan at Muar river near the market. While coming out of the sampan he fell into the river and was drowned.

In due course the respondents being the lawful widow and children of the deceased workman made an application to the Assistant Commissioner for Labour, Muar for compensation under the Workmen's Compensation Ordinance. At an inquiry held by the commissioner under section 27 of the Ordinance the parties agreed that the deceased was a workman within the meaning of the Ordinance and that the applicants were the dependants of the deceased. No agreement, however, was reached on whether the accident arose out of and in the course of employment and on liability for the amount of compensation claimed. The matter was therefore referred to the President, Sessions Court, Muar as arbitrator under the Ordinance. In the event, the arbitrator decided that the accident arose out of and in the course of deceased's employment and awarded to the dependants a sum of $7,200 as compensation. It is from that decision and the award of the arbitrator that this appeal has been brought.

In determining the question as to whether the deceased died of an accident arising out of and in the course of his employment, the learned arbitrator considered and relied on two decided cases. In the first case of *Kuppusamy* v. *Golden Hope Rubber Estate Ltd.*[1] the deceased was employed by the respondent company as a weeding labourer. On the day in question she went to the daily "muster" of work-people which was held prior to commencing the labours of the day with a view to the work-people obtaining instructions. She and others received certain instructions but finding that she had provided herself with the wrong tool for her appointed labours she returned to her house without the permission of anyone in a supervisory capacity. This was against the rules of the estate. At her home she fell down and sustained injuries from which she died. It was held that although the deceased was doing something which she was forbidden to do, the act was done for the purpose and in connection with her employer's trade and business and therefore the accident must be deemed to have arisen out of and in the course of her employment.

In the second case of *Blee* v. *London and North Eastern Railway Company*[2] a ganger of a railway company was, by the terms of his contract of service, liable to be called upon in case of emergency to go to the place where the emergency had arisen, notwithstanding that he might have finished his normal day's work, and when so called upon after his normal day's work he was entitled to be paid overtime from the hour he left his home in order to proceed to the place where the emergency had arisen. One night, after he had completed his day's work and after he had gone to bed, he received a message requiring him to go to a certain siding to assist in replacing a derailed truck, and in compliance with that order he rose and was proceeding to the siding when he was knocked down in the street by a motor car and sustained injuries from the effects of which he died. In reversing the decision of the Court of Appeal, the House of Lords held that as the deceased man was obliged by the terms of his contract to obey an emergency call at any hour, as he was paid from the time he left his home in obedience to the call, and as he was obliged to proceed with reasonable despatch to the place where his services were required, there was evidence to support the finding of the county court judge that the accident arose out of and in the course of the deceased man's employment, and that therefore his widow was entitled to compensation.

It is to be observed, as the learned arbitrator has rightly pointed out in his grounds of judgment, that the facts in *Kuppusamy's*[1] case differed only slightly from the facts in the present case, the difference being that in that case the deceased had already reported for work before going home to get the correct tools. Speaking of this difference in the facts, the learned arbitrator says that he was of the opinion that this difference "did not mean much" in deciding the question whether the accident arose out of and in the course of employment, because the emergency created by the breakdown of the machine in the present case made it necessary that the deceased should proceed to the factory to repair it forthwith. The learned arbitrator goes on to say that when the deceased in the present case went to the sampan to retrieve the tools he was doing what a good employee would have done under the circumstances, namely, avoiding the waste of time that would have occurred if he had to proceed to the factory first before going to the sampan to retrieve the tools.

It would seem clear that the facts in *Blee's*[2] case do not differ materially from the facts in the present case. In applying the decision in *Blee's* case to the facts of the present case, the learned arbitrator has this to say in his grounds of judgment:

"In the present case, I consider that a situation of emergency had arisen when the deceased was called back to the factory to repair the machine. In order to do the repairs he must have his tools. He therefore found it necessary to collect his tools from the sampan. On the face of it one would not see any connection between his employment at the factory and the taking of the tools from the sampan. But because of the need to have the tools to do the repairs, an indirect connection between the two was established, and therefore, the accident that ensued arose out of and in the course of his employment."

The main ground of appeal against the learned arbitrator's decision is that he erred in law when he found that the accident arose out of and in the course of the deceased's employment. It is submitted in support of this ground that one of the questions in this case is whether there was in fact an emergency bearing in mind that the deceased was sent for at 9.30 a.m. and yet the machine which he was required to repair continued working until 5 p.m. The evidence relied on in support of this submission is the evidence of Chew Poi Seet @ Choo Seat, one of the other employees who looked after the machines in the factory and could do a bit of repair work, to the effect that he finished work at 5 p.m., which would indicate that the machinery kept on working until then. It is further submitted that it was not part of the deceased's duty to go back whenever the machinery was out of order, as in *Blee's* case. It is said that here the deceased was sent for because of his standing instructions to Chew that he was to be sent for whenever anything was wrong. It is also said that there was no evidence by the employers that the deceased was required to go back and repair the machines as part of his general duties. Furthermore, the manager of the factory was in Batu Pahat on the day in question, so that he was not there to call the deceased in an emergency.

In my opinion nothing very much turns on the above submissions made on behalf of the appellants. It is clear from the evidence that the deceased was the expert in so far as the repairing of any machinery in the factory was concerned. In this connection, Lim Sin Guan, the manager of the factory, testified that the deceased had to repair all the machinery in the factory, to see that all the machinery was in proper working order, to purchase spare parts for the machinery from outside and sometimes to take part of the machinery from the factory to be repaired outside. As regards the deceased's obligation to go back to the factory when sent for, the manager gave evidence to say that there had been occasions when the deceased had been recalled to attend to the machines after he had finished his shifts. It is true that the manager was not in the factory on the day in question to give instructions for the deceased to be recalled, but there is evidence of the standing instructions of the deceased to his fellow engine drivers that he was to be sent for in an emergency. So long as there was an emergency it did not matter who sent for the deceased. The fact that there was an emergency is clear from the evidence of the deceased's wife that the owner of the factory himself called at her house and left a message for the deceased to go back. The fact that Chew finished work at 5 p.m. is by itself no evidence of the fact that the machine kept on working until that hour. Assuming that it did go on working until 5 p.m., the only reasonable conclusion one can draw is that perhaps somebody else had done some temporary repairs to it. In the light of all the evidence in the case I do not see how it can be said that the deceased was under no obligation to go back when sent for in an emergency.

Counsel for the appellants has sought to distinguish *Blee's* case from this case on the ground that there is no evidence here that the wages were paid from the time the deceased left his house to go to the place of emergency as there was in *Blee's* case. As the editorial note to *Blee's* case points out, the substantial question there was whether any differentiation was to be made between ordinary employment and emergency employment where payment commenced from the time the man leaves home. The Court of Appeal thought no distinction should be made; but the House of Lords, while not definitely deciding that the fact of payment commencing at the moment of the man's departure from home was decisive that the employment then commenced, held that, if the arbitrator so finds on the facts, that is a finding of fact which, provided there is evidence to support it, ought not to be disturbed by a higher court. The matter, therefore, becomes one of fact for the arbitrator.

In *Harris* v. *Associated Portland Cement Manufacturers, Ltd.*[3] it was held by the House of Lords that the fact that the workman acted in an extremely rash way did not prevent the accident from arising out of his employment. As the editorial note to that case points out, where a workman does a foolish thing, he is not barred by the foolishness of his action from recovering compensation so long as the act is within the sphere of his employment, though he is barred if the act is one outside that sphere. The question is not one of the degree of the foolishness or rashness of the act. It is one of the kind of act he is doing, that is, whether it is within the sphere of his employment.

It has also been contended on behalf of the appellants, on the authority of *Thomas* v. *Pentremawar Colliery Company Limited*,[4] that in going to the sampan to fetch his tools the deceased in the present case put himself outside the sphere of his employment. I do not think that the decision in that case applies here, because there the deceased at the time of the accident was transgressing a definite rule in entering the chamber to fetch the tools as cross-sticks had been placed in front of the tophole as a warning that no one was to enter it.

As was said by Lord Maugham in *Blee's* case, the fact that the payment of the workman was calculated from the time when he left home is not alone a sufficient reason for holding that his employment began at that time. What is important is the obligation of the workman to proceed to his place of work when he is called up in an emergency. There was ample evidence in this case that the deceased was the proper person to be sent for in an emergency. There was also evidence that the manager of the appellant company had previously called the deceased back outside his normal working hours. It is reasonable to infer from that evidence that there were standing instructions to other employees, in the absence of the manager, to summon the deceased to repair the machines. There is evidence that on the message being delivered to him by his wife the deceased left his house immediately. The learned arbitrator was therefore quite right in holding that the deceased had been sent for in an emergency. There was no inherent danger in his going to the sampan to fetch his tools. What he did was for the benefit of his employers. The accident which took place as he was coming out of the sampan after fetching his tools must therefore be deemed to have arisen out of and in the course of his employment.

For the reasons I have stated, I would hold that the learned arbitrator rightly decided that the deceased died of an accident arising out of and in the course of his employment. The amount of compensation which was awarded has not been challenged. I would therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Allen, Gledhill & Ball; Tan Tian Tiok & Co.*

SIM TIEW BEE v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P, Ismail Khan C.J. (Borneo) and Raja Azlan Shah J.) October 22, 1973]

[Kuching — Federal Court Criminal Reference No. 7 of 1972]

Evidence Act, 1950, s. 32 — Hearsay — Statement made by person in course of business — Admissible in evidence if it is proved that the maker is dead or cannot be found or has became incapable of giving evidence or whose attendance cannot be procured without reasonable delay or expense — Circumstances must be proved — Statement on labels or markings — Burden of proof — Unsworn statement — Criminal Procedure Code, 1960, s. 202(5).

In this case the applicant had been charged and convicted of the offence of being concerned in the importation of uncustomed goods. At the trial evidence of the following documents were admitted —

(1) the ship's manifest, without the master or officer responsible for the document being called to prove the contents;
(2) the tally sheet prepared by a tally-clerk, who was called to give evidence but stating measurements which were taken by a coolie in the presence of the tally-clerk;
(3) the words "Sim Tiew Bee, Sibu" on the gunny sacks as indicative of the name of the consignee.

An appeal to the High Court was dismissed and a reference to the Federal Court was made by the applicant.

Held: (1) the ship's manifest was inadmissible in evidence without the master or officer responsible for it being called to prove its contents but as it was a statement made by a person in the course of the business of the shipping company it would have been admissible if it was proved that the maker was dead, could not be found or had became incapable of giving evidence or whose attendance could not be procured without unreasonable delay or expense. As the condition precedent to the reception of the document had not been proved, the document was inadmissible;

(2) as the measurements noted in the tally sheet were taken by the coolie, only the coolie could give evidence of those measurements. The entry in the tally sheet was made in the course of the business of the shipping company and would have been admissible if the condition for its admission under section 32(b) of the Evidence Act had been satisfied. As there was no evidence of this, the document was inadmissible;

(3) the words "To Sim Tiew Bee" on the gunny sacks were labels or markings and therefore being hearsay, are not by themselves evidence that the applicant was the consignee of the goods;

(4) despite the wrongful admission of the documents, there was on the facts evidence to sustain the conviction. The applicant had failed to show on a balance of probabilities that his labourers had removed the wrong goods.

Cases referred to:-

(1) *Chainchal Singh* v. *Emperor* A.I.R. 1946 P.C. 1 at p. 2.
(2) *Bal Gangadhar Tilak & Ors.* v. *Shrinivas Pandit & Ors.* A.I.R. 1915 P.C. 7 at p. 11.
(3) *Scott* v. *Baker* [1969] 1 Q.B. 659 at p. 672.
(4) *Patel* v. *Controller of Customs* [1965] 3 All E.R. 593 at p. 597; (1966) A.C. 356.
(5) *Myers* v. *Director of Public Prosecutions* [1964] 2 All E.R. 881.

FEDERAL COURT.

C. T. Wong for the applicant.

Denis Ong Jiew Fook (Deputy Public Prosecutor) for the respondent.

Ismail Khan C.J. (Borneo): This is a reference to this court under section 66 of the Courts of Judicature Act, 1964 by the applicant (hereinafter called the appellant), the questions being:

(1) Whether or not the court can admit and take into consideration as true the contents of the following documents: —
   (a) Exhibits P14, P14A, P14B, P14C — the Ship's Manifest.
   (b) Page 26 of Exhibit P22 — Tally Sheet.
   (c) Exhibits 6-1, 6-2, and 6-3 with the words "SIM TIEW BEE, SIBU" on certain gunny sacks as indicative of the name of the consignee without calling the makers thereof.
(2) Whether an appellate court can invoke the provisions of section 32(b) of the Evidence Ordinance in admitting Exhibits P14, P14A, P14B, P14C — the Ship's Manifest and page 26 of Exhibit P22 — Tally Sheet when the basis of such admission was not being laid in the court of first instance.

The questions arose out of the following circumstances. The appellant was tried on an amended charge which reads:

"That you between 27th January and 2nd February of 1970 at Sibu were concerned in importing into Sarawak certain uncustomed goods to wit 23 various textile items as listed in the schedule attached and valued at $10,784.49 of which gross duty was assessed at $2,958.24, which arrived at Sibu Port on the m.v. 'Giang Ann' on the 2nd February 1970, and that you thereby committed an offence under s. 135(1)(a) punishable under s. 135(1)(i) of the Customs Act 1967."

The case for the prosecution is this.

On the 29th January, 1970, the ship m.v. "Giang Ann", left Singapore for Sarawak laden with cargo. Of this cargo, 37 packages described as foodstuffs were for Sim Tiew Bee Trading Company, Sibu, of which the appellant is the proprietor.

On the 2nd February, 1970, the ship arrived at Sibu. These 37 packages (hereinafter referred to as Group A) were offloaded to Godown "A". The appellant arrived at the customs for their release. He had two invoices, the first P3 relating to a consignment of 30 packages of peanut oil (hereinafter called the first consignment); the second P4 in respect of (a) 3 cases of dried olives; and (b) 4 cases of sweets, comprised in another consignment (hereinafter called the second consignment). These documents were accompanied by two mate receipts P9 and P10 relating to the first and second consignments respectively.

Along with these invoices and mate receipts (P3, P4 and P9 and P10) the appellant handed to the Customs Officers two declarations, P1 in respect of the first consignment and P2 in respect of the second consignment. After the usual check of these documents these two declarations P1 and P2 were passed as correct. P1, P3 and P10 were each given the number 3359 and P2, P4 and P9 the number 3500. The 37 packages were given a clearance by the Customs as being the goods set out in the documents, but without any phy-